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No. 89-1798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOSEPH ANTHONY FAUSTO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Proceeding upon the legal fiction that the petitioner, a layman appearing *pro se*, was *not* wrongfully removed from employment by the respondent agency for over two years, but was merely separated when his position was abolished, and then only *after* proper procedural steps were taken by the agency to effect such separation, including advance notice and a formal evidentiary hearing as provided in 5 C.F.R. § 351 (Pet. App. 15a), the Solicitor General adamantly insists upon mischaracterizing this case as a

"challenge to the [merits of an] adverse personnel action" (Br. in Opp. i). As a consequence, the Solicitor General fails to recognize the basic distinction that the petition attempted to draw between Tucker Act review of "the underlying personnel decision giving rise to [a] claim for back[]pay," which was barred by this Court in *United States v. Fausto*, 484 U.S. 439, 453 (1988), and Tucker Act review of a wrongfully discharged employee's "right to back pay in respect of a personnel action that *has been determined* to have been unjustified or unwarranted," which the Solicitor General declared that this Court was *not* deciding in that prior proceeding (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 5, n. 3).

The Solicitor General posits (Br. in Opp. 6) that the petition in this case should be denied because the decision below "is not merely correct, but is mandated by this Court's prior decision in petitioner's case" inasmuch as "no 'appropriate authority' has determined that the personnel action suspending [petitioner] for 30 days and removing him effective September 18, 1981, was 'unwarranted.'" In support, the Solicitor General reminds the Court (Br. in Opp. 4), in pertinent part, that "[w]hile acknowledging that in the past other courts had found jurisdiction under the Back Pay Act for suits such as petitioner's (see, *e.g.*, *Ainsworth v. United States*, 399 F.2d 176, 181 (Ct.Cl. 1968)), the Court held that . . . the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." It is submitted that this line of argument, although appearing persuasive, is superficial and fails to directly address the basic distinction be-

tween an agency's potential *liability* for subjecting an employee to an adverse personnel action and the scope of the *damages* to which such employee may be entitled under the Back Pay Act, 5 U.S.C. § 5596, *after* his agency has determined its own liability for effecting the underlying action in an improper manner.

The *Ainsworth* case cited by the Court in *United States v. Fausto*, 484 U.S. at 445 and 454, illustrates this principle. The opinion therein commenced with the statement (399 F.2d at 178): "This case was before us on the question of *liability* in *Ainsworth v. United States*, 180 Ct.Cl. 166 (1967), wherein we . . . held that . . . the [agency] had denied plaintiff the procedural rights to which he was entitled [emphasis added]." Thus is it clear that the former Court of Claims had *previously* determined the agency's liability (which action would now be barred by this Court's decision in *United States v. Fausto*), and was merely endeavoring, in the *Ainsworth* case cited by the Solicitor General (Br. in Opp. 4), to adjudicate the *damages* to which the employee was entitled under the Back Pay Act. Put another way, the Court of Claims did *not* then pronounce itself an "appropriate authority" to review the agency's personnel determination, but reaffirmed its historic Tucker Act jurisdiction to review the employee's "right to back pay in respect to a personnel action that *ha*[*d*] *been determined* to have been unjustified or unwarranted" (Reply Brief for the United States, *United States v. Fausto*, No. 86-595, at 5, n.3). In light of this, petitioner maintains that the decision below is *not* mandated by this Court's prior decision in his case, for there is nothing in that decision to

resolve the *different* question presented in the petition.

Nor, as the Solicitor General contends, is the decision below correct. Applying the plain words of the Back Pay Act, the Court of Claims held, in the later *Ainsworth* case cited by the Solicitor General (399 F.2d at 183):

> [T]he only relief plaintiff could have obtained if all procedural requirements had been followed would have been reassignment to a position as comparable to the one [from which he had been wrongfully removed]. Any wrongful demotion to a substitute position would give rise to a *different* cause of action. See *Newman v. United States*, 143 Ct.Cl. 784 (1958) [emphasis added].

It necessarily follows that where, as here, the agency did *not* reassign the petitioner to a comparable position but instead imposed a constructive suspension and "substituted a new removal date" (Br. in Opp. 6), such measures would give rise to a *different* cause of action. *A fortiori*, the suit which forms the basis for the petition in this case is *not* "barred by this Court's prior decision under *res judicata* principles" (Br. in Opp. 7) for it was *not* an attempt to relitigate the *one* jurisdictional matter resolved by *United States v. Fausto*, *i.e.*, "the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination" (484 U.S. at 454). Accordingly, the Claims Court retains its historic Tucker Act jurisdiction to review the *different* cause of action arising from an agency's failure to comply with the mandatory make-whole provisions of the Back Pay Act *after* it has made its own personnel determination.

It is instructive to note that the Court of Claims has observed that one of the purposes of "an *administrative agency* [personnel] decision . . . [is to] correct an action which is found to have been erroneous [and] to terminate a continuing liability" (*Ainsworth v. United States*, 399 F.2d at 181). Instead of candidly admitting that the respondent agency here unnecessarily *prolonged* its continuing liability to this petitioner, however, the Solicitor General rather grudgingly reports (Br. in Opp. 6-7) that "[i]t is well-established that in correcting a personnel action, an agency must *only* place an employee in the *status quo ante* [emphasis added]." This supposition is based in turn upon the Claims Court's "alternative[] rul[ing]" (Br. in Opp. 3) that petitioner "received all the relief to which he is entitled" (Br. in Opp. 6). Application of the facts of this case to the authorities cited by the Solicitor General would demonstrate that those authorities are fully supportive of the position urged by petitioner.

In *Boese v. Dept. of Air Force*, 784 F.2d 388, 390 (1986), the Federal Circuit held that the appellant had been "place[d] . . . as nearly as possible in the *status quo ante*" when the agency restored him to a position comparable to the one from which he was wrongfully removed "[b]ecause his former position . . . had been abolished in the interim." Here, the record indicates that, although petitioner's former position was abolished in the interim, the respondent agency made absolutely *no* efforts to even identify a comparable position to which to restore petitioner, let alone *offer* him reassignment to *any* position within its operation. Inasmuch as the ruling of the court of appeals below that the respondent agency "determined what personnel action [petitioner]

should have undergone" (Pet. App. 2a) "is purely speculative, and based on flimsy possibilities unsupported by hard facts or evidence" (*Boese*, 784 F.2d at 390), it cannot be seriously argued that petitioner was restored to the *status quo ante* within the meaning of *Boese*.

In *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (1984), the Federal Circuit observed that the wrongfully removed employee in that case declined his agency's order to return to his former position, claiming that because the agency had "shifted all the duties and responsibilities of his previously held position to another position . . . it had become a 'sham' position to which the agency wished to reinstate him" (726 F.2d at 731-2). First, the Federal Circuit succinctly pointed out that a "compliance issue is not an original 'personnel action'" (726 F.2d at 732), thus recognizing the basic distinction attempted to be drawn in the petition between judicial review of an "agency's personnel determination" (which was barred by *United States v. Fausto*, 484 U.S. at 454) and judicial review of an agency's *compliance* with its own cancellation order rendered under the legal authority of the Back Pay Act. Second, the court squarely held that "appropriate steps to enforce compliance [with a cancellation order] must include more than the formal determination that an individual was reinstated to a position bearing the same title, grade and pay—no matter what the actual content of that position may be at the time of reinstatement" (726 F.2d at 733). As it is abundantly clear that the *Kerr* court would have sternly rejected the Solicitor General's absurd argument that this petitioner was made whole within the meaning of the Back Pay Act when he was reinstated to "pre-

cisely the position that he would have occupied had he not been removed" (Br. in Opp. 7) in spite of the fact that the respondent agency *knew*, at the time of petitioner's reinstatement, that it had *abolished* that position over one year previously (Pet. App. 15a-16a), it cannot be conceivably argued that petitioner was restored to the *status quo ante* within the meaning of *Kerr*.

Writing for the majority in *Sampson v. Murray*, 415 U.S. 61, 74-5 (1974), the Chief Justice said that an agency determination that an employee was wrongfully removed "would prohibit the final separation of [the employee] unless and until proper procedures had been followed [because] Congress has provided that a wrongfully dismissed employee shall receive *full* payment and benefits for *any* time during which the employee was wrongfully discharged from employment [emphasis added]," citing the Back Pay Act, 5 U.S.C. § 5596, in the margin (415 U.S. at 75, n.31). Moreover, the Chief Justice held that the court below had erred when it relied on *FTC v. Dean Foods Co.*, 384 U.S. 597, 599-600 (1966), for the proposition that "the practical disappearance of one of the entities whose merger the Commission sought to challenge . . . would mean that the agency . . . would be incapable of implementing their statutory duties by fashioning effective relief" (415 U.S. at 77), whereas, in the case at bar, the government "strongly assert[ed] that the Back Pay Act . . . provides a complete remedy for any procedural irregularities which may have occurred in [that] case" (415 U.S. at 78, n.36). Applying these principles to the instant case yields the following analysis: First, it would seem that the Solicitor General would argue that petitioner received all of the relief to

which he was entitled under the Back Pay Act because his illegal January 16, 1981 removal was *actually* cancelled on September 18, 1981. However, the record (Pet. App. 11a-12a) reflects that the respondent agency issued the official cancellation order on February 1, 1983, thus, for the award of back pay to have been in compliance with the Back Pay Act, petitioner was entitled to retroactive salary to at least February 1, 1983, and the respondent agency was prohibited from finally separating petitioner *prospectively* "unless and until proper procedures [were] followed" (415 U.S. at 75). Second, it would seem that the Solicitor General in essence confesses an inability on the part of the respondent agency to fashion complete relief on the basis of "the practical disappearance" (415 U.S. at 77) of petitioner's former position. However, the Back Pay Act does *not* condition a wrongfully discharged employee's reinstatement upon the continuing existence of his former position, but "provides a complete remedy" (415 U.S. at 78, n.36) for such employee. Accordingly, it cannot be credibly contended that petitioner was restored to the *status quo ante* within the meaning of *Sampson v. Murray.*

Finally, the Solicitor General cites *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), for the proposition that "an injured party must be placed as nearly as possible in the position he would have occupied had the wrong not been committed" (Br. in Opp. 7). It is then asserted that this petitioner *was* placed "in precisely the position that he would have occupied had he not been removed" but that he was then constructively removed because "his temporary appointment expired by its own terms" (Br. in Opp. 7). However, the record demonstrates

that petitioner's *term* appointment was due to expire on September 30, 1982 (*Fausto v. United States*, 7 Cl.Ct. 459, 460 (1985). In view of the fact that, as of the date on which petitioner was illegally removed (January 16, 1981; Pet. App. 9a), he *still* had over a year and a half remaining on his *term* appointment, the respondent agency was obligated (1) to *award* petitioner back pay from January 17, 1981 to February 1, 1983 (the date on which his wrongful removal was cancelled; Pet. App. 12a), and (2) to *offer* petitioner a *prospective* term appointment not to exceed approximately twenty months. Only then would petitioner have been "placed as nearly as possible in the position he would have occupied had the wrong not been committed" (Br. in Opp. 7) under *Albemarle Paper Company*.

Concurring in *Albemarle Paper Company*, the Chief Justice observed that "[t]o the extent that an award of back[]pay were to be analogized to an award of damages, such an award upon proper proof would follow virtually as a matter of course from a finding that" (422 U.S. at 442) an employee had undergone an unwarranted personnel action within the meaning of the Back Pay Act, 5 U.S.C. § 5596. Although the Solicitor General does *not* dispute that the respondent agency itself made the determination that petitioner *had* undergone an unwarranted personnel action on January 16, 1981, he argues in essence that, with respect to the Back Pay Act, " '[t]he remedy of back pay . . . is entrusted to the [agency's] discretion [and] is not mechanically compelled by the Act' [*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941)]" (*Albemarle Paper Company*, 422 U.S. at 444). Where, as here, an award of back pay does *not* follow virtually as a matter of course

from a finding that an employee had undergone an unwarranted personnel action because an employing agency incorrectly believes that the remedy is entrusted to its discretion and is *not* mechanically compelled by the plain words of the Back Pay Act, it is clear beyond peradventure that the Claims Court must retain its historic Tucker Act jurisdiction to review the agency's *compliance* with the mandatory make-whole provisions of that Act *after* it has determined that the underlying personnel action was unwarranted.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case remanded for consideration of the question presented in the petition.[1]

Respectfully submitted,

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[1] Although the Brief in Opposition is silent with respect to H.R. 3086, the "Civil Service Due Process Amendments" (Pet. 9-10), the Court's attention is now directed to the recent development that the President of the United States signed the aforementioned legislation into law on August 17, 1990 (28 *Government Employee Relations Report* 1070 (1990)). Inasmuch as the practical effect of Public Law 101-376 (*id.*) will be to diminish the continuing vitality of *United States v. Fausto*, petitioner maintains that remand of this case to the court of appeals would be appropriate.